STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2003
v	No. 241425 Oakland Circuit Court
CARL BRADFORD SMITH, Defendant-Appellant.	LC No. 01-181247-FH

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals of right his jury trial convictions for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to three to forty years in prison for the cocaine conviction and one to fifteen years in prison for the heroin conviction. We affirm.

After conversing with an individual seated in a van parked outside defendant's mobile home, officers of the Southfield Police Department, became suspicious of narcotics activity in the home. Officer Lawrence Porter looked through the windows of the home and saw individuals moving about. When a woman from inside began to leave the home, Officer Porter ordered the woman, along with three other individuals including defendant, to the ground and did a brief sweep of the home. Officer Porter then asked the woman to give him what she had just bought, and she handed over a package of crack cocaine. Officer Porter thereafter arrested defendant, and in lifting him off the ground, discovered packets of heroin. Officers found another packet of heroin on defendant after searching his body. The officers thereafter obtained a search warrant, and in searching the home, found cocaine and drug paraphernalia.

I

Defendant first argues that the trial court erred in denying his motion to suppress evidence obtained during a search of defendant's home. "To the extent a trial court's decision regarding a motion to suppress is based on an interpretation of the law, appellate review is de novo." *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). Factual findings made in conjunction with the motion are reviewed for clear error. *Id.* Where, as in this case, the trial court made its decision solely on the basis of the preliminary examination transcript, "the trial

court was in no better position than this Court to assess the evidence, and there is no reason to give special deference to the trial court's 'findings.'" *Id.* at 445-446.

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The lawfulness of a search or seizure depends on its reasonableness, and searches conducted without a warrant are per se unreasonable unless the police have probable cause and one of the established exceptions applies. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search." *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000).

Here, officers noticed a van parked outside defendant's mobile home and approached the occupant. Based on a conversation with this individual, Officer Porter suspected narcotic activity in defendant's home, and proceeded to stand outside of the home and look through the windows. Although Officer Porter did not see defendant or any drug paraphernalia, he did see people performing "hand-to-hand" motions and mannerisms that were consistent with cocaine usage or sales. At the preliminary examination, Officer Porter stated that he was four or five feet away from the window.

Defendant primarily argues on appeal that Officer Porter's observations through the windows of defendant's home resulted in an unconstitutional search. Therefore, we first address whether Officer Porter's observations constituted an unconstitutional search. To implicate the Fourth Amendment, a defendant must demonstrate that he had a legitimate and reasonable expectation of privacy in the area searched and that the expectation is one society accepts as reasonable. See *People v Custer (On Remand)*, 248 Mich App 552, 560; 640 NW2d 576 (2001). "'Merely entering the private property of another is not an offense unless one has been forbidden to do so or refuses to depart after having been told to do so by a proper person.'" *Custer*, *supra* at 561 (citations omitted). In *Custer*, this Court held that, where a police officer stood on a defendant's front porch and looked in the window with the aid of his flashlight, the defendant did not have a reasonable expectation of privacy. See *Custer*, *supra* at 561.

In this case, Officer Porter stood in a common area of the mobile home park and looked through several windows of defendant's home. Apparently, the blinds in the front window were not drawn and Officer Porter could see clearly through this window. While the blinds in the back window were drawn, Officer Porter was able to see through an opening in the blinds. Officer Porter observed people moving back and forth and mannerisms consistent with drug activity. These observations were made after the officer had information that drug activity was taking place in the home. Under the circumstances, Officer Porter was in a place where he could properly be, and defendant has not shown that he had a legitimate and reasonable expectation of privacy that was offended. Thus, the Fourth Amendment was not implicated by the officer's observations through defendant's windows.

The next issue we address is whether any subsequent search or seizure offended defendant's Fourth Amendment rights. After observing the woman in the home attempt to leave, Officer Porter ordered the woman and remaining individuals in the home, including defendant, to the ground. After the woman handed Officer Porter a package of cocaine, Officer Porter arrested defendant. Upon a search of defendant, officers found several packages of heroin.

A warrant is not required to search an individual if the search is conducted incident to a valid arrest. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

> By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. [*Id.* at 115 (citations omitted). See also *People v MacLeod*, 254 Mich App 222, 227-228; 656 NW2d 844 (2002).]

"A search conducted immediately before an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search." *Champion*, *supra* at 115-116. "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Here, the officers had probable cause to arrest based on the conversation with the occupant of the van parked outside defendant's home and their observations thereafter. Under the circumstances, the search of defendant's person was a valid search incident to arrest.

After Officer Porter ordered the individuals to the ground, but before defendant's arrest, Officer Porter did a brief sweep of the home during which he saw drug paraphernalia in the front room. When a defendant is arrested in his home, the police may conduct a protective sweep of the premises to protect the arresting officers if the search is limited to a cursory inspection of those spaces where a person may be found. *Maryland v Buie*, 494 US 325, 335; 110 S Ct 1093; 108 L Ed 2d 276 (1990); *People v Gonzalez*, 256 Mich App 212, 233-234; 663 NW2d 499 (2003). Here, when Officer Porter encountered the individuals, the woman was on the steps of the home, while defendant and the two other individuals were standing together inside, near the door. When Officer Porter ordered all the individuals to the ground, the officers had valid concerns for the safety of themselves and others, and the search was conducted quickly.

If a police officer is lawfully in a position from which he can view an item of apparently incriminating character, the plain view doctrine allows the officer to seize that item, provided no search, however minimal, is conducted. *Harris v United States*, 390 US 234, 236; 88 S Ct 992; 19 L Ed 2d 1067 (1968); *Champion, supra* at 101; *People v Wilson*, 257 Mich App 337; 668 NW2d 337 (2003). Because Officer Porter was conducting a valid protective sweep of defendant's home, incident to arrest, the drug paraphernalia were obviously incriminatory, and they were on a coffee table in the main room of defendant's home, the seizure was valid under the plain view doctrine. Thus, under the circumstances, the trial court did not err in denying defendant's motion to suppress.

Defendant also argues that he was denied the opportunity for an evidentiary hearing because the trial court erroneously based its ruling on the motion to suppress entirely on the

preliminary examination transcripts. Defendant's stated issue on appeal is whether the trial court erred in denying defendant's motion to suppress, not whether defendant was denied an evidentiary hearing. Because the issue of whether the trial court erred in not holding an evidentiary hearing was not properly presented as an issue in defendant's brief, it is not properly before this Court. See *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Regardless, "[u]nder MCR 6.110(D), parties may stipulate to the use of a preliminary examination transcript to resolve a motion to suppress." *Zahn*, *supra* at 442 n 1, applying *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998). In his brief supporting his motion to dismiss, defendant acknowledged that "MCR 6.110(d) [sic] permits the Court to base its decision on the preliminary examination transcript," and both defendant and the prosecutor relied exclusively on the preliminary examination transcript in making their arguments. Defense counsel further stated, "[i]f the Court deems it necessary to its determination, the Defendant would ask that an evidentiary hearing be set concerning the issues contained in this brief." Defense counsel thereafter failed to object to the court's reliance on the preliminary examination transcript in deciding defendant's motion to suppress. Because defendant left it to the trial court to determine whether the hearing is necessary, we find the trial court did not err in relying on the preliminary examination transcript in making its decision.

II

Defendant next argues that there was insufficient evidence to convict him of delivery of cocaine. However, defendant's entire argument is misplaced, as he was not charged with or convicted of delivery of cocaine. Rather, defendant was charged with and convicted of "possess[ion] with intent to deliver less than 50 grams of a mixture containing the controlled substance, cocaine."

This Court "review[s] de novo challenges to the sufficiency of evidence in criminal trials to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime to have been proved beyond a reasonable doubt." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), citing *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "[T]o support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod 441 Mich 1201 (1992); *Gonzalez*, *supra* at 225-226.

In this case, the bags tested for cocaine contained .216 grams and .1 gram of cocaine respectively. This satisfies the requirement that the prosecution prove that the substance recovered is cocaine and in a mixture weighing less than fifty grams. "Actual physical possession is unnecessary for a conviction of possession with intent to deliver; constructive possession will suffice." *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002); *Wolfe*, *supra* at 519-520. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband," and "[p]ossession is attributed not only to those who physically possess the drugs, but also to those who control its disposition." *Johnson*, *supra* at 500; *Wolfe*, *supra* at 520. Like the defendant in *Wolfe*,

defendant, in this case, was in control of the premises, as he was the leaseholder of the mobile home. The police found a tabulation sheet and rental agreement together in the main room, near the television stand, twelve feet away from three rocks of crack cocaine. The police also found a crack pipe, crack paraphernalia, Chore Boy, and little baggies in the main room. Viewed in a light most favorable to the prosecution, the evidence permits the finding that defendant knew cocaine was present and had control over its disposition; thus, there was a sufficient nexus to find constructive possession.

"[A]ctual delivery of narcotics is not required to prove intent to deliver. Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe, supra* at 524; *Gonzalez, supra* at 226, discussing *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Defendant was found with over $1,100 on his person, and no other person at the mobile home had a large sum of money. The police found clean baggies, plates with a cutting agent on them, and a razor blade in the bedroom, all of which are consistent with a drug operation. Viewed in the light most favorable to the prosecution, the evidence permits the finding that defendant had the intent to deliver the cocaine.

III

Finally, defendant argues that the judgment of sentence must be amended because it does not comport with the sentence of the court. An issue must be properly raised before a trial court to be preserved for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because defendant failed to object when the court entered the Amended Judgment of Sentence, this issue has not been preserved and will be reviewed for a plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 382; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750; 762-763; 597 NW2d 130 (1999).

> To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: 1) error occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. . . . Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. [*Jones, supra* at 382; *Carines, supra* at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).]

The trial court originally entered a Judgment of Sentence, indicating that defendant was sentenced to three to four years in prison on the possession with intent to deliver less than fifty grams of cocaine conviction. The trial court then entered an Amended Judgment of Sentence, in which the sentence for the possession with intent to deliver less than fifty grams of cocaine conviction was amended to three to forty years in prison.

MCL 333.7401(2)(a)(iv) provides that an offender convicted of possession with intent to deliver less than fifty grams of cocaine "shall be imprisoned for not less than 1 year nor more than 20 years." Defendant was sentenced as a fourth habitual offender, MCL 769.12(1)(a), which authorizes a maximum sentence of life in prison.

The sentence in the original Judgment of Sentence was invalid. "Any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act." See *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). The original Judgment of Sentence provided a minimum of three years and a maximum of four years. Two-thirds of four years (the maximum sentence) is thirty-two months, and three years (the minimum sentence) is greater than thirty-two months, which is clearly violative of the rule. MCR 6.429(A) provides that "[t]he court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." "It is well-established that an invalid sentence may be set aside and a valid one imposed." *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997). It is also well established that courts speak through their judgments and decrees, not their oral statements or written opinions. *People v Stackpoole*, 144 Mich App 291, 298; 375 NW2d 419 (1985). The trial court did not make a clerical error on the Amended Judgment of Sentence, but rather, it corrected the error on the original Judgment of Sentence. Because there has been no plain error in imposing a forty-year maximum sentence for the possession with intent to deliver less than fifty grams of cocaine conviction, the sentence must be affirmed. *Jones, supra* at 382; *Carines, supra* at 763.

Affirmed.

/s/ Hilda R. Gage
/s/ Jessica R. Cooper

I concur in result only.

/s/ Helene N. White